IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF GEORGIA
VALDOSTA DIVISION

JAMES H. SWITZER, Plaintiff	:	
VS.	:	**7 : 04-CV-64 (RLH)**
WILLIAMS INVESTMENT CO., d/b/a DAYS INN OF ADEL, Defendant.	:	

ORDER

Presently pending in this diversity action is the Motion for Summary Judgment filed on behalf of defendant Williams Investment Co. Both parties have consented to the United States Magistrate Judge conducting any and all proceedings herein, including but not limited to the ordering of the entry of judgment. The parties may appeal from this judgment, as permitted by law, directly to the Eleventh Circuit Court of Appeals. 28 U.S.C. § 636(c)(3).

This premises liability case arises out of events occurring at the Days Inn hotel in Adel, Georgia, on January 17, 2004. This hotel is owned by the defendant, and was at the time of the alleged incident, undergoing renovations. The plaintiff, a truck driver at the time of the alleged incident, stopped in Adel on the night of January 16, 2004, while he was en route to Florida to make a delivery. In his deposition, the plaintiff testified that he checked into the Days Inn some time after midnight on the 17th, and began taking a shower the next morning. The shower, part of a shower/bathtub combination, was located in a small room with the toilet and adjacent to the sink/vanity area, with a single recessed light fixture located in the ceiling. The plaintiff testified

that he did not notice the absence of a cover on the light fixture. After standing underneath the running shower water for ten to fifteen minutes, the plaintiff raised his right arm to rinse off and then saw a bright flash of light and fell out of the tub, striking his neck and head on the toilet. After an apparent period of unconsciousness, the plaintiff regained consciousness and noticed glass on the floor. Plaintiff's feet were still on the edge of the tub, and he noted that the light bulb in the fixture at issue had been shattered. He also noted that the ceiling was wet, attempted to wipe the moisture from the ceiling, and became sick, vomiting in the sink. Plaintiff proceeded to dress and notified the front desk of the incident. Connie and Larry Frees, the area manager and the maintenance engineer for defendant's area hotels, arrived at the plaintiff's room; Connie frees offered him food or drink and Larry Frees replaced the light bulb and light cover. The plaintiff continued to feel sick, vomiting several more times, and then left the hotel and continued on to Florida to deliver his load. On his return trip, the plaintiff stopped at a hospital in Ocoee, was given a shot and released. The plaintiff spent the night in Wildwood and then returned to his home in Indiana the following day. The plaintiff alleges that he continues to suffer pain in his neck and head, as well as dizziness, numbness and tingling in the hands and feet. The plaintiff maintains that his treating physician has not released him to resume work due to his continuing impairments.

Standard of review

Pursuant to Rule 56 of the Federal Rules of Civil Procedure, summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." All facts and

reasonable inferences drawn therefrom must be viewed in the light most favorable to the nonmoving party, although the nonmoving party may not rest on the pleadings but must set forth specific facts showing that there is a genuine issue for trial. Fed. R. Civ. P. 56(e); Van T. Junkins & Assoc. v. U.S. Industries, Inc., 736 F.2d 656, 658 (11th Cir. 1984).

As the party moving for summary judgment, the defendant has the initial burden to demonstrate that no genuine issue of material fact remains in this case. Celotex Corp. v. Catrett, 477 U.S. 317, 325 (1986); Clark v. Coats & Clark, Inc., 929 F.2d 604 (11th Cir. 1991). The defendant has supported its motion with a memorandum, the pleadings, the deposition testimony of the plaintiff and defendant's employees Connie and Larry Frees, and the affidavits of Larry Frees and electrician James Simpson.

The defendant argues that it is entitled to summary judgment in that the cause of the alleged incident is merely a matter of speculation and conjecture, and because there has been no showing that the defendant had any knowledge of any hazardous condition on the premises. In response to the defendant's summary judgment motion, the plaintiff presents the affidavit of James V. Copeland, a licensed electrical contractor, who asserts that the uncovered light fixture violated the National Electric Code. The plaintiff argues that this violation of the National Electrical Code establishes the defendant's negligence per se, and that the issue of causation is a matter reserved for the jury.

"The owner or occupier of land has a duty to invitees to exercise ordinary care in keeping the premises safe. This duty of ordinary care requires the owner or occupier to protect the invitee from unreasonable risks of harm of which the owner has superior knowledge. To establish superior knowledge, [the plaintiff] must prove that (1) the defendants had actual or constructive

knowledge of the hazard; and (2) [he] lacked knowledge of the hazard despite the exercise of ordinary care due to the actions or conditions within the control of the owner or occupier. Hamblin v. City of Albany, 612 S.E.2d 69, 71 (Ga. Ct. App. 2005). However, "[i]n premises liability cases, proof of a fall, without more, does not give rise to liability on the part of a proprietor. The true basis of a proprietor's liability for personal injury to an invitee is the proprietor's superior knowledge of a condition that may expose the invitees to an unreasonable risk of harm. Recovery is allowed only when the proprietor had knowledge and the invitee did not." Emory Univ. v. Smith, 581 S.E.2d 405 (Ga. Ct. App. 2003).

In response to the defendant's summary judgment motion, the plaintiff presented the affidavit of James V. Copeland, a licensed electrical contractor, who testified that the uncovered light fixture violated the National Electric Code "because the same is located within a wet or damp area as above described and water can enter or accumulate in the wiring compartments, lampholders or other electrical parts and thus said luminaire is not suitable for wet or damp locations." Copeland affidavit at ¶ 7. Mr. Copeland further testified that "it is my professional opinion that a person could receive an electrical shock as a result of taking a shower in the location described in the affidavit of James L. Simpson, with the light switched 'on' and no protective globe on the luminaire." Copeland affidavit at ¶ 8. The defendant, in its reply to the plaintiff's response, objects to the proffer of Copeland as an expert and attacks Copeland's affidavit testimony, arguing that this testimony, as well as his subsequent deposition testimony, fail to create a genuine issue of material fact herein.

Defendant's summary judgment showing

In its summary judgment showing, the defendant relies on the plaintiff's deposition, and

the affidavits of Larry Frees and James Simpson. Frees, the maintenance engineer for the defendant, testified in his affidavit that it was his usual custom and practice to check every room at the Days Inn of Adel within any given three day period, and that to the best of his knowledge and belief, no one had reported any problem associated with the recessed light fixture in the room in question prior to January 17, 2004, nor had he observed and replaced a missing fixture cover. Mr. Frees further testified that the light fixture in the room in question had not been rewired or modified since the alleged incident involving the plaintiff on January 17, 2004.

James L. Simpson testified in his affidavit that he is a master electrician with over 46 years of experience in designing and working with electrical systems. Mr. Simpson inspected the wiring and light fixture at issue in Room 106 of the Days Inn of Adel, having been informed by Mr. Frees that no changes had been made thereto after the January 17, 2004, incident. Using a Multi-Meter, Mr. Simpson tested the wiring and light fixture and concluded that same was properly wired and connected to the electrical system, with proper grounding and no defects.

The defendant argues that the plaintiff cannot establish the defendant's superior knowledge of any hazard. The defendant cites to Hamblin v. City of Albany, 612 S.E.2d 69 (Ga. Ct. App. 2005), wherein a woman who injured her hand on a handrail at the Parks at Chehaw was defeated at the summary judgment stage of the proceedings, based on evidence that the park officials regularly maintained the handrails and had no knowledge that splintering had rendered the handrail hazardous. In granting the defendant's summary judgment motion, the Georgia Court of Appeals noted that

> [a]n owner or occupier is not "an insurer of an invitee's safety." The law requires only "such diligence toward making the premises safe as the ordinarily prudent person in such matters is accustomed to use." . . . [the plaintiff] has failed to show that the defendants'

> maintenance of the wooden handrail at the outdoor park created a dangerous condition. . . . . Because Hamblin failed to present sufficient evidence showing that the defendants had superior knowledge of a hazardous condition, there is no factual issue requiring jury determination.

Id. at 248-249 (internal citations omitted).

Plaintiff's response

In response to the defendant's motion for summary judgment, the plaintiff argues that the affidavit of James V. Copeland establishes that the uncovered light fixture was in violation of the National Electric Code and was therefore negligence per se. Although the plaintiff does not expressly state, he clearly proffers Mr. Copeland as an expert in the field of electrical installation and safety. "On a motion for summary judgment, disputed issues of fact are resolved against the moving party . . . But the question of admissibility of expert testimony is not such an issue of fact, and is reviewable under the abuse-of-discretion standard." General Electric Co. v. Joiner, 118 S. Ct. 512, 517 (1997).

"Under Rule 702 [of the Federal Rules of Evidence] and *Daubert*, district courts must act as 'gatekeepers' which admit expert testimony only if it is both reliable and relevant." Rink v. Cheminova, Inc, 400 F.3d 1286, 1291 (11th Cir. 2005). The *Daubert* requirements apply to all expert testimony. Kumho Tire Company, Ltd. v. Carmichael, 119 S. Ct. 1167, 1175 (1999).

> District courts are charged with this gatekeeping function "to ensure that speculative, unreliable expert testimony does not reach the jury" under the mantle of reliability that accompanies the appellation "expert testimony." To fulfil their obligation under *Daubert*, district courts must engage in a rigorous inquiry to determine whether: "(1) the expert is qualified to testify competently regarding the matters he intends to address; (2) the methodology by which the expert reaches his conclusions is sufficiently reliable as determined by the sort of inquiry mandated in *Daubert*; and (3) the testimony assists

> the trier of fact, through the application of scientific, technical, or specialized expertise, to understand the evidence or to determine a fact in issue." The party offering the expert has the burden of satisfying each of these three elements by a preponderance of the evidence.

Rink, 400 F.3d at 1291-92 (internal citations omitted).

The court notes that under *Daubert*, the gatekeeping inquiry "must be tied to the facts of a particular case", and that *Daubert* itself "makes clear that the factors it mentions do not constitute a definitive checklist or test." Kumho, 119 S. Ct. at 1175.

Herein, the plaintiff's expert, James V. Copeland, testified in his affidavit that he is a licensed electrical contractor with 25 years of experience as an electrician, "including wiring and placement of fixtures in residential and commercial structures." Copeland affidavit at ¶ 2. In his deposition testimony, Mr. Copeland testified that he called a City of Adel official to determine if the city had adopted the National Electric Code, after plaintiff's attorney contacted him and asked him to "research to see if there was any violation of a code." Copeland depo. at p. 8. In preparation to give his affidavit, Mr. Copeland read the plaintiff's deposition and the affidavit of defendant's electrical expert, contacted the City of Adel and reviewed the National Electric Code to determine if there was a violation. He did not look at the fixture itself that allegedly caused the shock to plaintiff, but did look at the photographs attached to the affidavit of defendant's expert. Mr. Copeland testified in his deposition that he had never worked as a code inspector, had never testified as an expert and had never given an affidavit prior to this case. When asked if he considered himself an expert on the National Electric Code, he replied that "[t]here's no such thing." Copeland depo. at p. 14. He elaborated that "[a]nybody that's an expert on the National Electric Code has no time to do anything but the National Electric Code. The National

Electric Code is a guide. I am familiar with the guide. I have been in the business for a considerable number of years and I know how to read." Copeland depo. at p. 14.

In regard to the substance of his affidavit testimony, Copeland testified that inasmuch as he had not seen the fixture itself, he did not know whether it was approved for damp locations, that he had installed similar light fixtures in bathrooms, and that he had never seen a brand or style of recessed light fixture that was not approved for both damp and dry locations. Copeland depo. at p. 14. Defendant's attorney asked Mr. Copeland:

> Q. . . . Let's assume that somehow in the course of taking a shower, Mr. Switzer slings some water over towards that light fixture and some got on the bulb and, for some reason, that bulb popped, but he didn't touch anything. Do you think he could get a shock that way?
>
> A. As far as getting a shock that way, the only way he could get a shock that way would have been for there to be a long enough chain of electrons to connect the source and him to ground, which is probably unlikely.

Copeland depo. at p. 28.

Mr. Copeland went on to testify that the only way a person could have received an electrical shock from the fixture was to have touched the filament of the broken bulb or to have touched the center contact of the bulbless fixture. Copeland depo. at p. 28-29. Defense counsel then asked Mr. Copeland:

> Q. But, otherwise, you can't point me to anyplace in the National Electric Code that makes that express statement about the requirement that a cover or globe must be on the fixture at all times?
>
> A. Every possibility is not listed in the code. It's just the things that they feel are necessary. It's not everything. It's just a minimum. I'll say that the National Electric Code is a minimum of things for safe practice."

Copeland depo. at pp. 36-37.

Under Rule 702 of the Federal Rules of Evidence and the guidelines set forth in *Daubert*, the court finds that Mr. Copeland's testimony regarding the light fixture at issue being in violation of the National Electric Code is not reliable, and that his experience does not qualify him as an expert herein. His testimony establishes that he is only "familiar" with the National Electric Code, that he never inspected the actual light fixture at issue herein, and that he had installed similar fixtures in bathrooms that were in fact approved for both damp and dry locations. Although Mr. Copeland testified to having 25 years of electrical contracting experience, his deposition testimony revealed that he had no experience as a code inspector or in offering opinions as an electrical expert. Moreover, Copeland's deposition testimony largely contradicts his affidavit testimony as to the light fixture posing a National Electric Code violation and as to the likelihood of receiving a shock as alleged by the plaintiff's version of events. As such, his testimony fails to create a genuine issue of material fact as to the defendant's superior knowledge of any hazard. The plaintiff has offered no other testimony or evidence to rebut the defendant's showing that it did not possess any knowledge of any hazard in Room 106 of the Days Inn of Adel prior to January 17, 2004. "The mere showing of the occurrence of any injury, without more, does not create a presumption of negligence. Rather, the true ground of liability is the owner's superior knowledge of the peril and the danger therefrom." Clemmons v. Griffin, 498 S.E.2d 99, 100 (Ga. Ct. App. 1998). Accordingly, the defendant's Motion for Summary Judgment is hereby **GRANTED**.

SO ORDERED, this 31st day of March, 2006.

/s/ ***Richard L. Hodge***
RICHARD L. HODGE
UNITED STATES MAGISTRATE JUDGE

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